

OGC 9 - 1683 (a)

20 November 1959

LRH
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MEMORANDUM FOR: Mr. Houston

SUBJECT: ONE Dual Compensation Case

1. The individual involved is currently under contract of 3 December 1958, which fixes compensation at "\$50.00 per day." This contract contains the statement: "Contractor is not a retired civilian employee of the United States." Prior to the date of this contract, he was paid under a contract dated 17 March 1953 which provided for payment "per consultation." This contract contained a similar statement that the contractor was not a retired civilian employee. At least one other ONE consultant in the same status (Foreign Service Retirement System Annuitant) appears to have been paid under similar contracts of similar dates.

2. Section 6 of the Act of May 10, 1916, as amended, 5 USC 58, provides:

"Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000.00 per annum."

3. Section 1765, Revised Statutes, 5 USC 70, provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulation, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

4. The Court of Claims held in Brunswick v. United States, 90 Ct. Cls. 285 (1940), that a Foreign Service annuity was not a salary within the meaning of 5 USC 58. (The second source of income in the Brunswick case was clearly a salary.)

5. The Comptroller General, referring to his previous decision against Brunswick and to the Court of Claims decisions, stated in 32 Comp. Gen. 89, at page 91, that: "while the decisions of the Court of Claims are followed herein in many instances, they are not binding upon this office in the absence of affirmation by the Supreme Court of the United States."

6. The Comptroller General has consistently held, however, that payment on a fee basis was not salary within the meaning of 5 USC 58 or 5 USC 70. In 31 Comp. Gen. 567 (1952) it was stated:

"Since a person serving on a fee basis does not hold an office to which compensation is attached payment of such fees is not prohibited by section 6 of the 1916 act, as amended. Likewise, section 1765, Revised Statutes, does not apply to the payment of compensation on a fee basis when the fees are payable under separate and distinct employments. 16 Comp. Gen. 909, and cases therein cited. Consequently, the payment of fees from appropriated funds for services rendered on behalf of the United States in separate cases by psychiatrists employed at Gallinger Hospital does not violate the provisions of the dual compensation statutes."

For the record, I quote below from other Comptroller General Decisions on this point:

(a) 26 Comp. Gen. 501, 503 (January 17, 1947)

"So far as I am aware this office has not had occasion to pass upon the question of whether an officer of the armed forces retired for disability, who is employed as a consultant upon a fee basis, holds a 'civilian office or position,' within the meaning of those words as used in section 212 of the Economy Act, but it has been held in respect of the act of July 31, 1894, 28 Stat. 205, as amended (5 U.S.C. 62) that the engaging of the services of a physician as consultant, by contract or otherwise, upon a fee basis, for services actually performed, is not an appointment to an 'office to which compensation is attached,' within the meaning of those words as used in the said 1894 statute. See 22 Comp. Gen. 312, and decisions cited therein; also 23 Comp. Gen. 275, 277. It would not appear that the consultants the Veterans' Administration is desirous of employing in the instant matter will perform or supervise duties and responsibilities imposed by law upon the agency, or be under the administrative control of an official of the Government in the usual sense. On the contrary, it is understood that their employment will be in an advisory capacity. That is to say, that their duties will consist primarily of expressing their views and giving their opinions and recommendations upon particular problems and questions presented to them for consideration, in consultation or otherwise, by administrative officers of the Government. Hence, while appointments under Public Law 718, approved August 10, 1946, 60 Stat. 978, are to 'any civilian office or position,' it reasonably may be concluded that the employment by the Veterans' Administration of former officers of the armed forces retired for disability as consultants upon a fee basis pursuant to section 14(a) of Public Law 293, supra, will not be in contravention of section 212 of the Economy Act--no sound reason being perceived for regarding them as occupying an 'office or position' within the meaning of those terms as used in said statute notwithstanding that the term 'Compensation' as used therein is sufficiently broad to include fees."

(b) 18 Comp. Gen. 768, 773 (April 6, 1939)

"... Compensation fixed pursuant to statute on the basis of a day constitutes a periodical payment for services depending upon the time (day) and not upon the amount of services rendered. A bailiff is paid for the day regardless of the amount of work he may perform during the day. In 22 Comp. Dec. 678, there were involved fees of a music teacher not based on the time served; in 22 Comp. Dec. 693, notarial fees; in 24 Comp. Dec. 532, fees of clerks of United States courts under laws then in force (see, however, existing laws authorizing payment of salary to clerks of United States courts, sections 557-9, title 28, U.S. Code); 2 Comp. Gen. 37, fees of a physician for performing autopsies; in 3 Comp. Gen. 563, fees for X-ray examinations; and in 3 Comp. Gen. 1012, fees of United States Commissioners. As none of the payments considered in these decisions of the former accounting officers of the United States was based on time element but, on the contrary, was made up of charges for separate services, the decisions correctly concluded they were fees and not salaries within the meaning of the dual compensation act of 1916...."

(c) 16 Comp. Gen. 909, 910 (March 10, 1937)

"It has been held by this office that the payment of an indefinite and undetermined aggregate per annum made up of charges for separate services dependent entirely upon contingencies beyond the control of the Government or employee, such as are ordinarily described as 'fees', does not constitute salary within the purview of the act of May 10, 1916, as amended, supra. 3 Comp. Gen. 563. The decision of March 2, 1936, 15 Comp. Gen. 751, is not to be regarded as holding that the said act of 1916 precludes a person employed in a part-time position on an annual basis from receiving compensation fixed by contract or agreement on a fee basis under a separate and distinct employment."

"The engaging of the services of a physician by contract on a competitive basis does not vest him with 'an office to which compensation is attached' within the purview of section 2 of the act of July 31, 1894, supra. 1 Comp. Dec. 286."

(d) 3 Comp. Gen. 563, 564 (March 1, 1924)

"... The payment of an indefinite and undetermined total aggregate amount per annum, made up of charges for separate services dependent entirely upon contingencies without the control of the Government or the employee, is not 'salary' within the meaning of the statute. Such payments are classed as fees for professional service

and the annual aggregate total of such fees does not come within the prohibition of the statute against payment of two salaries aggregating more than \$2,000. See 22 Comp. Dec., 678; 2 Comp. Gen., 37; 27 MS. Comp. Gen., 819."

7. I conclude that under the 1953 contract we have no problem, inasmuch as payment on a fee basis was provided for. Under the 1958 contract, still in effect, (providing for payment on a time basis) it would appear that payment is authorized under the rule set forth in Brunswick but not under the rule held to by the Comptroller General. Whichever way we go with respect to payments made under the latter contract, I would suggest that all of these contracts be amended immediately to specify fee basis.

8. The individuals involved have been paid under unvouchered funds from the beginning.

9. ONE has been advised that no collections back seem indicated at this time but that all contracts for this group should be amended forthwith to reflect fee basis and to eliminate the negative statement with respect to retirement.



Office of General Counsel

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